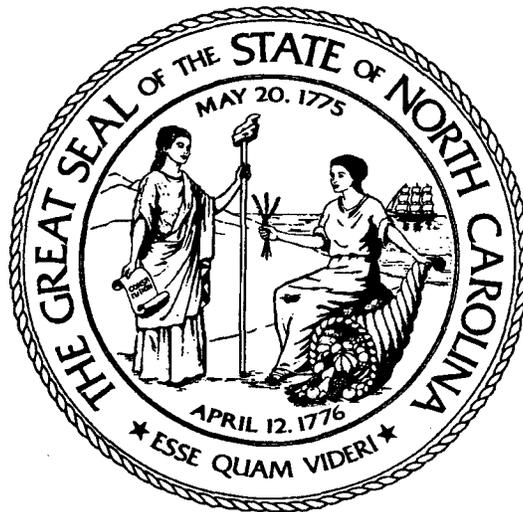


**LEGISLATIVE
RESEARCH COMMISSION**

**MINORITY BUSINESS CONTRACTS AND
SMALL BUSINESS ASSISTANCE**



**REPORT TO THE
1991 GENERAL ASSEMBLY
OF NORTH CAROLINA
1991 SESSION**

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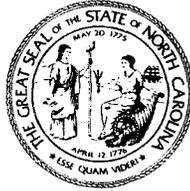
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STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27611



December 14, 1990

TO THE MEMBERS OF THE 1991 GENERAL ASSEMBLY:

The Legislative Research Commission herewith submits to you for your consideration its final report on minority business contracts and small business assistance. The report was prepared by the Legislative Research Commission's Committee on Minority Business Contracts and Small Business Assistance pursuant to Section 2.1 of Chapter 802 of the 1989 Session Laws.

Respectfully submitted,

Josephus L. Mavretic
Speaker

Henson P. Barnes
President Pro Tempore

Cochairmen
Legislative Research Commission

1989-1990

LEGISLATIVE RESEARCH COMMISSION

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PREFACE

The Legislative Research Commission, established by Article 6B of Chapter 120 of the General Statutes, is a general purpose study group. The Commission is co-chaired by the Speaker of the House and the President Pro Tempore of the Senate and has five additional members appointed from each house of the General Assembly. Among the Commission's duties is that of making or causing to be made, upon the direction of the General Assembly, "such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" (G.S. 120-30.17(1)).

At the direction of the 1989 General Assembly, the Legislative Research Commission has undertaken studies of numerous subjects. These studies were grouped into broad categories and each member of the Commission was given responsibility for one category of study. The Co-chairs of the Legislative Research Commission, under the authority of G.S. 120-30.10(b) and (c), appointed committees consisting of members of the General Assembly and the public to conduct the studies. Co-chairs, one from each house of the General Assembly, were designated for each committee.

The study of Minority Business Contracts and Small Business Assistance was authorized by Section 2.1(8) of Chapter 802 of the 1989 Session Laws (1989 Session). That act states that the Commission may consider Senate Bill 927 and House Joint Resolution 1514 in determining the nature, scope and aspects of the study. The relevant portions of Chapter 802 and Senate Bill 927 and HJR 1514 are included in Appendix A. The Legislative Research Commission grouped this study in its Governmental Capital Assets, Contracting and Functioning area under the direction of Senator Ralph A. Hunt. The Committee was chaired by Senator Hunt and Representative Thomas C. Hardaway. The full membership of the Committee is listed

in Appendix B of this report. A committee notebook containing the committee minutes and all information presented to the committee is filed in the Legislative Library.

COMMITTEE PROCEEDINGS.

The Committee was charged with conducting a study based on:

- * Senate Bill 927, which proposed a 10% goal for participation by minority businesses in all State contracts; and
- * House Joint Resolution 1514, which proposed a study of coordination and duplication in small business assistance programs.

For a summary of the meetings that occurred before the 1990 Short Session of the General Assembly, please see the Committee's Interim Report, submitted to the Short Session.

In its Interim Report, the Committee recommended the passage of a bill to direct the Department of Administration to gather information about participation by minority business enterprises (MBEs), women's business enterprises (WBEs), and disabled business enterprises (DBEs) in public contracts. The General Assembly passed House Bill 2263 (Chapter 1051 of the 1989 Session Laws), which contains the Committee's basic recommendation with certain changes (Appendix C).

The Department made a preliminary report to the Committee on October 25 of the data it collected pursuant to the new act from the State agencies, University and community college campuses, and local boards of education (Available in Committee Notebook in Legislative Library).

After the Short Session, the Committee met five times: September 20, October 4, October 25, November 14, and November 29. It spend much of that time working out a proposed bill to establish a comprehensive goals program for the State. The Co-Chairs, Senator Hunt and Representative Hardaway, stated their desire to have the Committee recommend such a bill. The Committee heard from representatives of minority-owned business, women-owned business, and disabled-owned business, from local government, from the Department of Administration, and from other interested groups. The Committee approved the basic contents of the proposed bill at its meeting on November 11, and approved the final draft as part of this Final Report on November 29.

The other aspect of the study, according to its charge, was duplication in the State's total effort to assist small business. The Committee attempted to coordinate its study with an operational audit of the same area that was being conducted by the State Auditor's office. The editing process within the Auditor's office took longer than expected, however, and the Committee's deadline for a Final Report arrived before the Auditor could release the audit; the Auditor is required to give all agencies mentioned in an audit 30 days to comment before the audit is released to the public. Although the audit was still in the comment stage when the Committee closed shop, the members heard a report at the October 25 meeting from Mr. Glenn Waters of the Auditor's Office outlining its general findings. Mr. Waters said the audit would identify 43 different organizations in the area of small business assistance, receiving a

total of \$136.4 million in State appropriations. Among the problems the audit would find with that configuration, Mr. Waters said, were:

- * Lack of program purpose and accountability,
- * Duplication and fragmented service,
- * Conflicts of interest, and
- * Lack of meaningful program information.

Also on the topic of small business, the Committee voted on November 14 to recommend a standard definition of the term "small business" to be used where appropriate in State government. Rep. W. Pete Cunningham pressed the need for such a definition; he was named head of a subcommittee to work one out, and that subcommittee's definition was adopted by the full Committee.

FINDINGS AND RECOMMENDATIONS.

BACKGROUND: In 1983 the General Assembly enacted a statement of policy "to encourage and promote the use of small, minority, physically handicapped and women contractors" in State contracting for goods and services, construction, and highway work. G.S. 143-48, 143-135.5, and 136-28.4.

Since that time the General Assembly has gradually enacted goals programs to implement those general statements of policy:

- * Goods and Services. In 1987, the Governor promulgated a program to enhance participation by minority-, women-, and disabled-owned businesses in contracts for goods and services within his Cabinet departments. That same year, the General Assembly expanded that program to encompass all State agencies, UNC campuses, community colleges, and local school boards, with a goal of 4 percent participation by all local agencies. The program was reduced back to the Cabinet departments in 1988, but the 1990 General Assembly restored a mandatory reporting program for all State agencies, UNC campuses, community colleges, and local school boards.
- * Construction of Buildings. In 1989, the General Assembly set a 10 percent goal for participation by minorities (defined to include women) in all State contracts for construction of buildings. In the same bill, the General Assembly required local governments to set an "appropriate verifiable goal" for minority participation.
- * Highway Construction. In 1989, the General Assembly set a 10 percent goal for participation by minorities (defined so as not necessarily to include women) in highway construction contracts using State funds. That goal was changed in 1990 to 10 percent for minorities (defined as ethnic minorities) and 5 percent for women. The Department of Transportation has counted businesses that are both minority and women under the minority category.

In addition, several local governments, including Durham, Charlotte, New Hanover County, Guilford County, and Winston-Salem, put local goals programs in place, some of them setting higher goals than those set by the General Assembly.

The U.S. Supreme Court, in City of Richmond v. Croson, held a 30 percent quota program for contracts with a city to be an unconstitutional violation of the Equal Protection rights of non-minority businesses. That decision turned on the city's lack of documentation of a level of discrimination that needed to be remedied by a 30-percent quota. The Attorney General of North Carolina, asked to give an opinion of the constitutionality of North Carolina's goals programs in light of the Croson case, said he believed that those programs did not violate the principles stated in Croson, because North Carolina's goals programs did not enforce a preference that would impede a color-blind awarding of contracts to the lowest bidder. (See Attorney General's Opinion, Appendix D).

FINDING I: The Committee finds that businesses owned by minorities, women, and disabled persons are under-represented not only in public contracts in North Carolina, but in the State's economy itself. Information about participation by such businesses is hard to come by, but the Office of

Purchase and Contract in the Department of Administration reports that its mailing list of potential vendors for goods and services appears to have 2.6 percent MBEs, 2.9 percent WBEs, and less than one tenth of 1 percent DBEs--percentages significantly lower than those groups appear in the population.

RECOMMENDATION I: The Committee recommends that the General Assembly take steps to encourage participation by MBEs, WBEs, and DBEs in public contracts.

FINDING II: The Committee finds that, by using goals programs rather than quotas, North Carolina has taken a sound approach to encouraging participation by disadvantaged businesses. The approach is appropriate in light of the Croson case and of the Attorney General's opinion to the Committee, and because State and local governments already have become familiar with the goals strategy.

RECOMMENDATION II: The Committee recommends that the General Assembly continue to follow the approach of setting percentage goals for participation by minority business enterprises (MBEs), women's business enterprises (WBEs), and disabled business enterprises (DBEs), without letting the goals impede the awarding of public contracts to the lowest responsible bidder.

FINDING III: The Committee finds that, despite the soundness of the goals approach, the result of the State's gradual development of goals programs is a haphazard piece of work: thorough in some areas but thin in others, inconsistent in definitions, and uncertain in authority for enforcement.

RECOMMENDATION III: The Committee recommends that the General Assembly adopt a uniform goals program for State and local government. The program should use a uniform set of definitions for MBEs, WBEs, and DBEs. The program should cover all kinds of public contracts except highway construction (a highly specialized area, closely tied to federal practice, with a goals program of its own that has already been worked out). The general program should be centrally coordinated by the Department of Administration.

FINDING IV: The Committee finds that for State agencies, the need for predictability and simplicity supports the establishment of a uniform, realistic set of goals for participation by MBEs, WBEs, and DBEs, but that for local governments, the need for flexibility tilts the scale toward allowing the local officials to set goals that are appropriate to the local situation, as long as a floor is set to prevent abuse of discretion.

RECOMMENDATION IV: The Committee recommends that the goals for State agencies be 10 percent for MBEs, 5 percent for WBEs, and 2 percent for DBEs. The Committee recommends that each local government be directed to set appropriate verifiable goals, after a public hearing, that the government determines will foster maximum contracting opportunities for MBEs, WBEs, and DBEs, in light of local circumstances, provided that those goals not go below a floor of 5 percent for MBEs, 2.5 percent for WBEs, and 1 percent for DBEs. (The Committee considered with interest, but did not adopt, a proposal to require that local governments publish the reasons for adopting goals lower than the goals for State agencies.)

FINDING V: The Committee finds that disadvantaged businesses, government decision-makers, and general contractors have been hampered by not having a reliable, systematic way of finding out what businesses are owned by minorities, women, and the disabled, and how well those businesses are represented in public contracts.

RECOMMENDATION V: The Committee recommends that the Department of Administration be directed to conduct, with cooperation from other agencies and governments, a program of outreach, solicitation, certification, and listing of MBEs, WBEs, and DBEs. The Committee recommends that the Department be in charge of collecting and compiling reports on participation by those businesses in public contracts. The Committee recommends that each State agency and local government designate a liaison with the Department for the program.

FINDING VI: The Committee finds that the State Auditor has conducted for months a study of State programs to assist small business. The Auditor has said the resulting performance audit, which is scheduled to be released in late 1990, will reveal a constellation of inadequately coordinated, often duplicative programs.

RECOMMENDATION VI: The Committee recommends that the members of the 1991 General Assembly read the performance audit of small-business-assistance programs and pay close attention to its findings and recommendations.

FINDING VII: The Committee finds that the State of North Carolina, despite its various programs to assist small businesses, has not followed the example of other states and adopted a uniform definition of "small business." It finds that a flexible, yet not-overly-complicated definition would be helpful.

RECOMMENDATION VII: The Committee recommends the following general definition of small business:

"A 'small business' is an independently owned business with its principal ownership and management domiciled in North Carolina that meets the following criteria:

1. For a manufacturing business, 250 employees or less.
2. For a wholesale business, 100 employees or less.
3. For a retail business, \$3,500,000 or less in annual sales.
4. For a service business, \$3,500,000 or less in annual sales.
5. For a general construction business, \$17,000,000 or less in annual sales.
6. For an agricultural business, \$500,000 or less in annual sales.

The six categories of businesses in this definition shall contain the same subcategories as are shown at 13 CFR 121.601 (the Standard Industrial Codes as determined by the U.S. Small Business Administration), but the size

standards in this definition will not vary within each of the six categories, regardless of the subtype of business."

Recommendations I, II, III, IV and V are incorporated in the draft bill at Appendix E.

APPENDIX A

GENERAL ASSEMBLY OF NORTH CAROLINA
1989 SESSION
RATIFIED BILL

CHAPTER 802
SENATE BILL 231

AN ACT TO AUTHORIZE STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, TO CREATE AND CONTINUE VARIOUS COMMITTEES AND COMMISSIONS, TO MAKE APPROPRIATIONS THEREFOR, AND TO DIRECT VARIOUS STATE AGENCIES TO STUDY SPECIFIED ISSUES.

The General Assembly of North Carolina enacts:

PART I. TITLE

Section 1. This act shall be known as "The Studies Act of 1989."

...

PART II.-----LEGISLATIVE RESEARCH COMMISSION

Sec. 2.1. The Legislative Research Commission may study the topics listed below. Listed with each topic is the 1989 bill or resolution that originally proposed the issue or study and the name of the sponsor. The Commission may consider the original bill or resolution in determining the nature, scope and aspects of the study. The topics are:

...

- (8) State Procurement Contracts to Minority Business Enterprises (S.B. 927 - Hunt of Durham) and Small Business Technical Assistance Programs (H.J.R. 1514 - Colton),

...

Sec. 2.2. Legislative Activity Between Legislative Sessions and Procedures to Shorten the Legislative Session. The Legislative Research Commission may study the procedures of this State's, other states' and other legislative bodies' practices and procedures regulating legislative and study activity and may make recommendations as to changes in law, procedures and rules that will lead to greater efficiency in the legislative process while safeguarding the rights of all members of the General Assembly and of the citizens in this State's legislative process.

...

Appendix A

Sec. 2.4. Committee Membership. For each Legislative Research Commission Committee created during the 1989-1991 biennium, the Cochairmen of the Commission each shall appoint a minimum of seven members.

Sec. 2.5. Reporting Dates. For each of the topics the Legislative Research Commission decides to study under this act or pursuant to G.S. 120-30.17(1), the Commission may report its findings, together with any recommended legislation, to the 1990 Session of the 1989 General Assembly or the 1991 General Assembly, or both.

Sec. 2.6. Bills and Resolution References. The listing of the original bill or resolution in this Part is for reference purposes only and shall not be deemed to have incorporated by reference any of the substantive provisions contained in the original bill or resolution.

Sec. 2.7. Funding. From the funds available to the General Assembly, the Legislative Services Commission may allocate additional monies to fund the work of the Legislative Research Commission.

...

PART XXV.-----EFFECTIVE DATE

Sec. 25.1. This act shall become effective July 1, 1989.

In the General Assembly read three times and ratified this the 12th day of August, 1989.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

S

1

SENATE BILL 927

Short Title: Minority Business Enterprises.

(Public)

Sponsors: Senators Hunt of Durham, Ballance, Richardson, and Martin of Guilford.

Referred to: Small Business.

April 18, 1989

A BILL TO BE ENTITLED

1
2 AN ACT TO PROVIDE OPPORTUNITIES TO PARTICIPATE IN STATE
3 PROCUREMENT CONTRACTS TO MINORITY BUSINESS ENTERPRISES.

4 The General Assembly of North Carolina enacts:

5 Section 1. Chapter 143 of the General Statutes is amended by adding a
6 new Article to read:

7 "ARTICLE 3E.

8 "Minority Business Enterprises.

9 "§ 143-64.40. Purpose.

10 The purpose of this Article is to provide maximum contracting opportunities to
11 minority business enterprises. To further this purpose:

12 (1) Each Department, except the Department of Transportation as to
13 construction contracts, shall structure its procedures for procuring
14 supplies, services, maintenance, and construction to attempt to
15 achieve a minimum goal of ten percent (10%) of the total dollar
16 value of these procurements that are made directly or indirectly
17 from certified minority business enterprises;

1 (2) The Department of Transportation shall structure its procurements
2 for procuring construction to attempt to achieve participation by
3 certified minority business enterprises, in the amount of a
4 minimum goal of ten percent (10%) of the dollar value of contracts
5 in excess of one hundred thousand dollars (\$100,000) on the prime
6 or subcontract level; and

7 (3) Each procurement agency shall structure its procedures for
8 procuring supplies, services, maintenance, and construction to
9 encourage a fair participation in the State procurement process by
10 certified minority business enterprises.

11 § 143-64.41. Definitions.

12 As used in this Article, unless the context indicates otherwise:

13 (1) 'Certification' means a determination by the Minority Business
14 Development agency in the Department of Commerce that a legal
15 entity is a minority business enterprise for purposes of this Article.

16 (2) 'Control' means the exercise of the power to manage and operate
17 a business enterprise.

18 (3) 'Department' means the Department of Administration, The
19 University of North Carolina, and the Department of
20 Transportation.

21 (4) 'Goal' means a voluntary percentage or quantitative objective.

22 (5) 'Minority Business Enterprise' (MBE), means any legal entity,
23 other than a joint venture, organized to engage in commercial
24 transactions, that is at least fifty-one percent (51%) owned and
25 controlled by one or more minority persons, or a non-profit entity
26 organized to promote the interests of the physically or mentally
27 disabled.

28 (6) 'Minority person' means a member of a socially or economically
29 disadvantaged minority group, and includes Blacks, Hispanics,
30 American Indians, Alaska natives, Asians, Pacific Islanders,
31 women, and the physically or mentally disabled.

32 (7) 'North Carolina Minority Business Development agency' means an
33 agency in the Small Business Development Division of the
34 Department of Commerce.

35 (8) 'Ownership' means:

- 1 a. For a sole proprietorship, that the sole proprietor is a
2 minority person. If the ownership interest held by a
3 minority person is subject to formal or informal restrictions
4 such as options, security interests, or agreements held by a
5 nonminority person or business entity, the options, security
6 interests, or agreements held by the nonminority person or
7 business entity may not significantly impair the minority
8 person's ownership interest.
- 9 b. For a partnership, that at least fifty-one percent (51%) of the
10 partnership's assets or interests are owned by a minority
11 person or minority persons. If the ownership interest held
12 by a minority person is subject to formal or informal
13 restrictions such as options, security interests, or agreements,
14 held by a nonminority person or business entity, the options,
15 security interests, or agreements held by the nonminority
16 person or business entity may not significantly impair the
17 minority person's ownership interest.
- 18 c. For a corporation, that legal and equitable ownership of at
19 least fifty-one percent (51%) of all classes of stock, bonds, or
20 other securities issued by the corporation is owned by a
21 minority person or minority persons. If an ownership
22 interest held by a minority person is subject to formal or
23 informal restrictions such as options, security interests, or
24 agreements held by a nonminority person or business entity,
25 the options, security interests, or agreements held by the
26 nonminority person or business entity may not significantly
27 impair the minority person's ownership interest.
- 28 (9) 'Procurement agency' means any State agency that is authorized by
29 law or regulations to procure or contract.
- 30 (10) 'Solicitation notice' means public notice of a solicitation for bids,
31 offers, or expressions of interest which contains the nature of the
32 procurement, relevant dates, the availability of solicitation
33 documents, if any, and other pertinent information. The notice
34 shall consist of, but is not limited to:
- 35 a. Legal advertisement;

- 1 b. Newspaper notice;
2 c. Bid board notice; or
3 d. Bid or proposal documents including the invitation for bids
4 or request for proposals.

5 **"§ 143-64.42. Scope of Article.**

6 This Article applies to every procurement of supplies, services, maintenance, and
7 construction by a Department or procurement agency. Nothing in this Article is to
8 be construed to relieve a Department from attempting to achieve its statutory
9 cumulative contract goal for MBE participation.

10 **"§ 143-64.43. Department and procurement agency responsibility.**

11 (a) Each Department and procurement agency shall make its procurements in
12 accordance with this Article. Each local board of education shall adopt procedures
13 consistent with this Article before obtaining State funds for public school construction
14 projects. When delegating procurement authority to procurement agencies and other
15 departments, the Department of Administration shall condition the delegation on
16 compliance with this Article.

17 (b) Departments and procurement agencies shall, to the extent practicable,
18 develop uniform affidavits and reporting forms required by this Article.

19 **"§ 143-64.44. MBE Liaison Officer.**

20 The head of each Department and procurement agency shall designate an
21 employee to be an MBE Liaison Officer in the administration of that agency's
22 minority business enterprise program. The MBE Liaison Officer shall be a high-level
23 employee reporting directly to a Secretary, Deputy Secretary, or head of a
24 Department or procurement agency. The MBE Liaison Officer shall be responsible
25 for coordinating agency outreach efforts to the minority business community,
26 reviewing agency contracting procedures to assure compliance with this Article,
27 assisting in the resolution of contracting issues, and for the submission of all required
28 MBE program reports or information.

29 **"§ 143-64.45. Central directory.**

30 The North Carolina Minority Business Development agency and the Department
31 of Administration shall publish a central directory of MBEs certified by the North
32 Carolina Minority Business Development agency under G.S. 143-64.53. The central
33 directory shall specify the type of supplies, services, maintenance, or construction
34 primarily provided by the MBE, and the date of certification. The central directory
35 shall include:

1 (1) The address;
2 (2) Phone number; and
3 (3) Contact person
4 of all certified MBEs; and the name of every business entity that has been denied
5 certification or decertified within the last two years. The directory shall be updated
6 at least quarterly, and if feasible, monthly.

7 **"§ 143-64.46. Outreach.**

8 Outreach efforts to minority business enterprises shall advise of contracting
9 opportunities within the State as follows:

10 (1) Departments and procurement agencies shall periodically conduct
11 meetings with minority business enterprises, as appropriate, to
12 advise of procurement opportunities within that Department or
13 agency. These meetings shall be coordinated with the North
14 Carolina Minority Business Development agency and other State
15 agencies which make similar procurements.

16 (2) The Minority Business Development agency shall:
17 a. Periodically convene seminars that include the minority
18 business community and appropriate personnel of the
19 various Departments and procurement agencies. These
20 seminars shall address topics of interest to prospective or
21 current MBEs such as State procurement procedures,
22 certification, and anticipated State procurements. The
23 Minority Business Development agency may provide
24 technical assistance to MBEs relating to the procurement
25 process.
26 b. Provide notice of all seminars and meetings undertaken
27 under this regulation to each minority business listed in the
28 central directory that may be reasonably expected to be
29 interested in the effort, as well as to those entities described
30 in G.S. 143-64.47(3).

31 **"§ 143-64.47. MBE notification.**

32 A Department or procurement agency shall notify MBEs of procurement contract
33 opportunities as follows:

34 (1) Minority business enterprises listed in the central directory or
35 otherwise known to the Department or procurement agency as

- 1 providing the supplies, services, maintenance, or construction
2 activity being procured, and that may be reasonably expected to be
3 interested in an upcoming procurement as decided by the
4 Department or procurement agency, shall be sent a copy of the
5 solicitation notice as part of the solicitation process being
6 employed for the business community in general. The Department
7 or procurement agency shall solicit a sufficient number of MBEs as
8 to reasonably assure one or more MBE responses to the
9 solicitation. A Department or procurement agency shall have
10 fulfilled the solicitation requirements of this Article if it has used
11 the central directory in the solicitation process. Each solicitation
12 notice shall include the following statement: "Minority business
13 enterprises are encouraged to respond to this solicitation notice."
- 14 (2) Within 30 days following the first day of the fiscal year, every
15 Department and procurement agency shall forward to the Minority
16 Business Development agency a complete listing of all known
17 regularly recurring procurement solicitations reasonably expected
18 to be of one hundred thousand dollars (\$100,000) or more. The
19 list shall include the subject of the contract, where the work is to
20 be performed or delivery made, the approximate solicitation date
21 and the name and telephone number of the procurement officer.
22 The Minority Business Development agency shall compile a master
23 list containing the above information, and distribute it to the
24 Division of Small Business Development of the Department of
25 Commerce, appropriate minority business associations, minority
26 business assistance agencies, trade organizations, and to each
27 Department and procurement agency which shall post the list on
28 all bid boards for the remainder of the fiscal year.
- 29 (3) Except for sole source, small, and emergency procurements, a copy
30 of the solicitation notice for each procurement shall be sent to the
31 Minority Business Development agency for distribution to the
32 appropriate minority business associations, minority business
33 assistance agencies, and trade organizations identified by the
34 Minority Business Development agency. One copy of solicitation
35 documents for these procurements shall be made available by the

1 Department or agency, free of charge, to these entities on request.
2 The copy shall be marked "For Informational Purposes Only."

3 "§ 143-64.48. Procurement solicitations.

4 (a) A Department or procurement agency shall assess the potential for MBE
5 participation expected under each of the methods described in subsection (b) of this
6 section before initiating the procurement. The Department or procurement agency
7 shall utilize the MBE procurement method, or combination of methods decided most
8 appropriate for the particular contract.

9 (b) The following factors shall be used to anticipate the degree of MBE
10 participation, to decide the MBE subcontract participation goal, when used, and the
11 MBE procurement method to be used:

12 (1) The extent to which the direct solicitation, subcontracting
13 opportunity method, or combination of both methods, is
14 determined most likely to result in maximum MBE participation in
15 the contract;

16 (2) The number of MBEs listed in the central directory or otherwise
17 identified for a particular supply, service, maintenance, or
18 construction;

19 (3) The geographical proximity, when relevant, of MBEs identified
20 under subdivision (2) of this section to the location of the work to
21 be performed;

22 (4) The feasibility of subcontracting opportunities given the nature and
23 extent of the proposed contract; and

24 (5) Specific statutory participation goals applicable to a Department's
25 procurement.

26 (c) The Department of Administration may employ the following procurement
27 methods:

28 (1) Direct solicitation. If known MBEs can provide the entire
29 contract, then the MBEs may be solicited directly as part of the
30 solicitation process being employed for the business community in
31 general.

32 (2) MBE subcontract method. Notwithstanding whether a direct
33 solicitation is made under subdivision (1) of this subsection, all
34 Department of Transportation construction contracts in excess of
35 one hundred thousand dollars (\$100,000) and all other

1 construction contracts in excess of fifty thousand dollars (\$50,000)
2 shall contain an MBE subcontract participation goal, expressed as a
3 percentage of the dollar value of the contract that should be
4 attempted to be subcontracted to MBEs. A Department or
5 procurement agency may establish an MBE subcontract goal for a
6 particular construction contract of fifty thousand dollars (\$50,000)
7 or less, or any supply, maintenance, or service contract. A bidder
8 or offeror shall submit with its bid or proposal a completed MBE
9 utilization affidavit on a form provided by the appropriate
10 Department or procurement agency. The names of prime
11 contractors requesting or purchasing solicitation documents for
12 construction contracts shall be made available on request to any
13 certified MBEs whose specialty suggests an interest in
14 subcontracting. Each prime contractor given solicitation
15 documents as part of a procurement under the MBE subcontract
16 method, and who does not have an updated central directory shall
17 be given, upon request, one copy of the directory or the pertinent
18 portions for purposes of soliciting subcontract quotations, bids, or
19 offers from certified MBEs.

20 (3) Combination procurement method. A combination of direct
21 solicitation and the MBE subcontract methods, pursuant to
22 subdivisions (2) and (3) of this subsection, which may be used
23 when the Department or procurement agency decides this method
24 will be most likely to achieve the greatest degree of MBE
25 participation.

26 (4) Pre-bid and pre-proposal conferences. When pre-bid or pre-
27 proposal conferences are held, the Department or procurement
28 agency shall explain the MBE subcontracting goal, if applicable,
29 the MBE provisions of the solicitation, the documentation required
30 and its relationship to the bidder responsiveness and responsibility
31 or offeror acceptability determinations which will be made in
32 connection with the evaluation process.

33 (5) Federal requirements. To the extent required by federal assistance
34 instruments applicable to contracts let by the State under a federal

1 assistance program, those MBEs meeting requirements and criteria
2 of the federal government shall be utilized.

3 "§ 143-64.49. Contract award.

4 (a) The Department of Administration may require all determinations under this
5 section and G.S. 143-64.50 to be made before execution of a contract, or approval by
6 the Department, or both.

7 (b) A contract involving subcontracts shall be subject to the Department or
8 procurement agency concluding that the apparent low bidder or successful offeror
9 meets the applicable MBE participation provisions contained in the solicitation. The
10 apparent low bidder or successful offeror shall, within 10 working days from the date
11 of award of the contract or notification that it is the apparent low bidder or successful
12 offeror, whichever is earlier, submit any required documentation. Nothing in this
13 regulation is intended to preclude the award of a contract conditionally upon receipt
14 of any required documentation.

15 (c) Whenever an uncertified minority business is identified for contract award, the
16 Department or procurement agency shall forward the affidavit of the minority
17 business to the Department of Administration and the Minority Business
18 Development agency for certification consistent with G.S. 143-64.53. A contract may
19 be awarded notwithstanding the pendency of certification. The certification entity
20 shall notify the Department or procurement agency promptly of its disposition. In
21 the event of an unfavorable disposition, the Department or procurement agency shall
22 include that fact as part of its annual report and may not, in the future, treat that
23 business entity as an MBE until it is certified.

24 (d) If a Department or procurement agency determines that the apparent low
25 bidder or successful offeror has not complied with the MBE subcontract participation
26 contract goal and has not obtained a waiver in accordance with G.S. 143-64.50, or if
27 the bidder or offeror fails to submit the documentation required by the solicitation,
28 the procurement officer, upon review by an assistant attorney general and approval of
29 the Department or agency head having jurisdiction over the contract, may reject the
30 bid or offer or cancel the award of the contract. The reasons for this action shall be
31 specified in writing and mailed or delivered to the bidder or offeror.

32 "§ 143-64.50. Waiver.

33 (a) If, for any reason, the apparent low bidder or successful offeror is unable to
34 achieve the contract goal for MBE participation, the bidder or offeror may request, in
35 writing, an exception to the goal with justification, including the following:

- 1 (1) A detailed statement of the efforts made to select portions of the
2 work proposed to be performed by MBEs in order to increase the
3 likelihood of achieving the stated goal;
- 4 (2) A detailed statement of the efforts made to contact and negotiate
5 with MBEs including:
- 6 a. The names, addresses, dates, and telephone numbers of
7 MBEs contacted, and
- 8 b. A description of the information provided to MBEs
9 regarding the plans, specifications, and anticipated time
10 schedule for portions of the work to be performed;
- 11 (3) As to each MBE that placed a subcontract quotation or offer which
12 the apparent low bidder or successful offeror considers not to be
13 acceptable, a detailed statement of the reasons for this conclusion;
14 and
- 15 (4) A list of minority subcontractors found to be unavailable. This list
16 should be accompanied by an MBE unavailability certification
17 signed by the MBE, or a statement from the apparent low bidder
18 or successful offeror that the MBE refused to give the written
19 certification.
- 20 (b) A waiver of an MBE contract goal may be granted only upon a reasonable
21 demonstration by the bidder or offeror that MBE participation was unable to be
22 obtained or was unable to be obtained at a reasonable price, and a determination by
23 the agency head or the agency head's designee that the public interest is served by a
24 waiver. In making a determination under this section, the agency head or agency
25 head's designee may consider engineering estimates, catalogue prices, general market
26 availability, and availability of MBEs in the area work is to be performed, other bids
27 or offers and subcontract bids or offers substantiating significant variances between
28 MBE and non-MBE cost of participation, and their impact on the overall cost of the
29 contract to the State, and any other relevant factor.
- 30 (c) A Department or agency head may waive any of the provisions of G.S.
31 143-64.48 and G.S. 143-64.49 for a sole source or emergency procurement in which
32 the public interest cannot reasonably accommodate use of those procedures.
- 33 (d) When a waiver is granted, except waivers under subsection (c) of this section,
34 one copy of the waiver determination and the reasons for the determination shall be

1 kept by the MBE Liaison Officer with another copy forwarded to the Minority
2 Business Development agency.

3 "§ 143-64.51. Amendment for unforeseen circumstances.

4 If at any time before execution of a contract, the apparent low bidder or successful
5 offeror determines that an MBE has become or will become unavailable, then the
6 apparent low bidder or successful offeror shall immediately notify the procurement
7 officer. Any desired change in the schedule for participation shall be approved in
8 advance by the procurement officer and shall indicate the contractor's efforts to
9 substitute another MBE subcontractor to perform the work. Desired changes
10 occurring after the date of contract execution may occur only upon written approval
11 by the Department or agency head and subsequently by contract amendment.

12 "§ 143-64.52. Compliance.

13 (a) To assure compliance with MBE subcontract requirements, a Department or
14 procurement agency may require a contractor to furnish:

15 (1) Copies of purchase orders, subcontracts, cancelled checks, and
16 other records that may indicate the number, names, dollar value of
17 MBE subcontracts, dates, and schedule time for performance of
18 work by an MBE subcontractor; and

19 (2) Entry for an on-site verification inspection.

20 (b) Upon determining a contractor's noncompliance, the Department or
21 procurement agency shall notify the contractor in writing of its findings and shall
22 specify what corrective actions are required. The contractor shall be required to
23 initiate the corrective actions within 10 days and complete them within the time
24 specified by the Department or procurement agency.

25 (c) If a Department or procurement agency determines that substantial non-
26 compliance with MBE contract provisions exists and that the prime contractor refuses
27 or fails to take the corrective action required by the Department or procurement
28 agency, then the following sanctions may be invoked:

29 (1) Termination of the contract;

30 (2) Referral to the office of the Attorney General for appropriate
31 action; or

32 (3) Initiation of any other specific remedy identified by contract.

33 "§ 143-64.53. Certification.

34 (a) Contractors seeking to be certified by and do business with the Department of
35 Transportation shall use certification procedures developed by that Department. The

1 Department of Transportation shall also develop recertification and decertification
2 procedures.

3 (b) Contractors seeking to be certified for procurements solicited by other
4 Departments or procurement agencies shall file an application with the Minority
5 Business Development agency of North Carolina.

6 (c) The Minority Business Development agency may request the following
7 information to assist in any certification, recertification, and decertification
8 determination.

9 (1) Copies of articles of incorporation, bylaws, minutes, shareholder
10 agreements, stock certificates, stock transfer ledgers, any additional
11 profit-sharing agreements or buyout rights, or in the case of a
12 partnership, the partnership agreement;

13 (2) Current financial statements, business licenses, the prior two years'
14 federal tax returns, cancelled checks, resumes of principal parties,
15 and any relevant personal and third-party agreements, such as
16 rental and management agreements;

17 (3) Any other information that the certifying entity determines is
18 necessary.

19 Failure to furnish the requested information within a reasonable time as specified in
20 writing may result in a denial of certification or recertification, or a determination to
21 decertify.

22 (d) Certification as an MBE by the Minority Business Development agency shall
23 be made by disclosure affidavit and any other supporting documentation that may be
24 required.

25 (e) All certifications by the Minority Business Development agency shall be valid
26 until terminated by the agency after which MBEs previously certified are required to
27 re-submit disclosure affidavits and other required supporting documentation. All
28 MBEs certified before the effective date of this Article may be recertified as required
29 by the Minority Business Development agency.

30 (f) The Minority Business Development agency may decertify a business, which it
31 finds no longer is a minority business enterprise. A decertified business entity may
32 reapply for certification 12 months from the date of the decertification. A new
33 affidavit and any supporting documentation required shall be submitted as if the
34 business entity were requesting initial certification.

35 "§ 143-64.54. Reporting requirements.

1 (a) Each Department and procurement agency shall make a report annually
 2 within 90 days following the close of the fiscal year to the Minority Business
 3 Development agency:

- 4 (1) The total number and value of its procurements from State
 5 certified MBEs as prime contractors, and separately as
 6 subcontractors;
 7 (2) The percentage which purchases and contracts from MBEs
 8 represent of its total number and value of its procurements from
 9 business enterprises for the fiscal year just ended;
 10 (3) The number of waivers granted pursuant to G.S. 143-64.50; and
 11 (4) An evaluation by the Department of the success of its MBE
 12 program.

13 The Minority Business Development agency shall prepare an annual report
 14 summarizing MBE participation throughout the State for submission by the end of
 15 each calendar year to the General Assembly and to each Department and
 16 procurement agency."

17 Sec. 2. G.S. 143-48 reads as rewritten:

18 **"§ 143-48. State policy; cooperation in promoting the use of small, minority, physically**
 19 **handicapped and women contractors; purpose.**

20 It is the policy of this State to encourage and promote the use of small, minority,
 21 physically handicapped and women contractors in State purchasing of goods and
 22 services. All State agencies, institutions and political subdivisions shall cooperate with
 23 the Department of Administration and all other State agencies, institutions and
 24 political subdivisions in efforts to encourage the use of small, minority, physically
 25 handicapped and women contractors in achieving the purpose of this Article, which
 26 is to provide for the effective and economical acquisition, management and
 27 disposition of goods and services by and through the Department of Administration.
 28 Accordingly, all contracts entered into for the purchase of goods and services
 29 pursuant to this Article shall be subject to the provision of Article 3E of this
 30 Chapter."

31 Sec. 3. G.S. 143-135.5 reads as rewritten:

32 **"§ 143-135.5. State policy; cooperation in promoting the use of small, minority,**
 33 **physically handicapped and women contractors; purpose.**

34 It is the policy of this State to encourage and promote the use of small, minority,
 35 physically handicapped and women contractors in State construction projects. All.

1 State agencies, institutions and political subdivisions shall cooperate with the
2 Department of Administration and all other State agencies, institutions and political
3 subdivisions in efforts to encourage and promote the use of small, minority,
4 physically handicapped and women contractors in achieving the purpose of this
5 Article, which is the effective and economical construction of public buildings.
6 Accordingly, all contracts entered into for the purchase of goods and services
7 pursuant to this Article shall be subject to the provision of Article 3E of this
8 Chapter."

9 Sec. 4. G.S. 136-28.4 reads as rewritten:

10 **"§ 136-28.4. State policy; cooperation in promoting the use of small, minority,**
11 **physically handicapped and women contractors.**

12 It is the policy of this State to encourage and promote the use of small, minority,
13 physically handicapped and women contractors in the construction, alteration and
14 maintenance of State roads, streets, highways, and bridges and in the procurement of
15 materials for such projects. All State agencies, institutions and political subdivisions
16 shall cooperate with the Department of Transportation and all other State agencies,
17 institutions and political subdivisions in efforts to encourage and promote the use of
18 small, minority, physically handicapped and women contractors in such State
19 construction, alteration, maintenance and procurement. Accordingly, all contracts
20 entered into for construction, alteration, maintenance, and procurement in excess of
21 one hundred thousand dollars (\$100,000) pursuant to this Article shall be subject to
22 the provisions of Article 3E of Chapter 143 of the General Statutes."

23 Sec. 5. This act shall become effective January 1, 1990.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

H

I

HOUSE JOINT RESOLUTION 1514

Sponsors: Representatives Colton, Redwine, DeVane, and Hardaway.

Referred to: Rules.

May 1, 1989

1 A JOINT RESOLUTION TO AUTHORIZE THE LEGISLATIVE RESEARCH
2 COMMISSION TO STUDY SMALL BUSINESS TECHNICAL ASSISTANCE
3 PROGRAMS.

4 Whereas, The North Carolina Department of Administration has
5 estimated that the State spends approximately \$9,000,000 each year on small business
6 assistance programs; and

7 Whereas, program direction and administration is divided among a
8 number of different agencies, including the Small Business Division in the
9 Department of Commerce, the Technological Development Authority in the
10 Department of Commerce, the Small Business Centers in the Department of
11 Community Colleges, and the Small Business and Technology Development program
12 in The University of North Carolina; and

13 Whereas, several universities have affiliated economic development
14 centers, such as the Regional Development Institute, the Center for Improving Rural
15 and Coastal Living, and the Center for Improving Mountain Living, which offer
16 business-related assistance; and

17 Whereas, regional organizations such as Councils of Government and
18 other development and planning agencies also receive annual appropriations for
19 economic development; and

1 Whereas, in addition, there is also a variety of services from State, local,
2 and volunteer organizations:

3 Now, therefore, be it resolved by the House of Representatives, the Senate
4 concurring:

5 Section 1. The Legislative Research Commission is authorized to study
6 small business assistance programs. The Commission shall:

- 7 (1) Develop a complete listing of all small business technical assistance
8 services currently offered in North Carolina, with special emphasis
9 on those receiving annual appropriations of State funds specifically
10 directed to technical and managerial assistance;
- 11 (2) Determine what services are offered and to what extent they are
12 utilized;
- 13 (3) Identify areas of overlap and duplication;
- 14 (4) Explore particular kinds of services actually needed by small
15 business, and to what extent these are provided by existing
16 agencies; and
- 17 (5) Investigate the extent of coordination and cooperation among the
18 service providers.

19 Sec. 2. The Commission shall include representatives from small
20 businesses in both urban and rural areas of the State in its study of small business
21 assistance programs. In addition, the Commission shall include at least one
22 representative of a State, local government, or private entity that provides a small
23 business assistance program.

24 Sec. 3. The Commission shall make a final report of its findings and
25 recommendations to the 1991 Session of the General Assembly. The report shall
26 include recommendations on the following issues:

- 27 (1) How to improve coordination and efficiency of service delivery
28 among the programs providing small business services;
- 29 (2) Whether additional changes, including additional services, are
30 needed to provide quality assistance to small business;
- 31 (3) The need for increases or decreases in funding to carry out these
32 recommendations; and
- 33 (4) Whether to develop a performance-based funding system for
34 providers of technical and managerial services to small business in
35 North Carolina.

1 Sec. 4. This resolution is effective upon ratification.

APPENDIX B

MEMBERSHIP OF LRC COMMITTEE ON MINORITY BUSINESS CONTRACTS
AND SMALL BUSINESS ASSISTANCE.

President Pro Tem's Appointments

Sen. Ralph A. Hunt
Co-Chair (LRC Member in Charge)
1005 Crete Street
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Sen. N. Leo Daughtry
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Sen. Robert L. Martin
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Sen. William N. Martin
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(919)373-1108

Mr. Bob Quinn, Asst. Director
Neuse River Council of Govts.
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Hon. Wilma C. Woodard
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Staff:

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(704)688-3544

Rep. W. Pete Cunningham
3121 Valleywood Place
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(704)394-9499

Rep. Harry C. Grimmer
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Rep. Howard J. Hunter, Jr.
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Rep. Annie B. Kennedy
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Rep. Timothy N. Tallent
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(704)782-5983

Clerk:

Janet Puryear
Legislative Building, Room 2009
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GENERAL ASSEMBLY OF NORTH CAROLINA
1989 SESSION
RATIFIED BILL

CHAPTER 1051
HOUSE BILL 2263

AN ACT TO REQUIRE REPORTING TO THE DEPARTMENT OF ADMINISTRATION OF PARTICIPATION BY DISADVANTAGED BUSINESSES IN PUBLIC PROCUREMENT CONTRACTS AND TO REQUIRE THE DEPARTMENT TO COLLECT, COMPILE, AND REPORT THE DATA; AND TO CLARIFY THE PUBLIC BIDDING LAW FOR SINGLE-PRIME AND SEPARATE-PRIME COMPETITIVE BIDS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143-48 reads as rewritten:

"§ 143-48. **State policy; cooperation in promoting the use of small, minority, physically handicapped and women contractors; purpose; required annual reports.**

(a) It is the policy of this State to encourage and promote the use of small, minority, physically handicapped and women contractors in State purchasing of goods and services. All State agencies, institutions and political subdivisions shall cooperate with the Department of Administration and all other State agencies, institutions and political subdivisions in efforts to encourage the use of small, minority, physically handicapped and women contractors in achieving the purpose of this Article, which is to provide for the effective and economical acquisition, management and disposition of goods and services by and through the Department of Administration.

(b) Every governmental entity required by statute to use the services of the Department of Administration in the purchase of goods and services and every private, nonprofit corporation other than an institution of higher education or a hospital that receives an appropriation of five hundred thousand dollars (\$500,000) or more during a fiscal year from the General Assembly shall report to the Department of Administration annually on what percentage of its contract purchases of goods and services, through term contracts and open-market contracts, were from minority-owned businesses, what percentage from female-owned businesses, and what percentage from disabled-owned businesses. The same governmental entities shall include in their reports what percentages of the contract bids for such purchases were from such businesses. The Department of Administration shall provide instructions to the reporting entities concerning the manner of reporting and the definitions of the businesses referred to in this act, provided that, for the purposes of this act:

(1) A business in one of the categories above means one:

- a. In which at least fifty-one percent (51%) of the business, or of the stock in the case of a corporation, is owned by one or more persons in the category; and
- b. Of which the management and daily business operations are controlled by one or more persons in the category who own it; and

- (2) A female or a disabled person is not a minority, unless the female or disabled person is also a member of one of the minority groups described in G.S. 143-128(c)(2)a through d; and
- (3) A disabled person means a 'handicapped person' as defined in G.S. 168A-3(4).

The Department of Administration shall collect and compile the data described in this section and report it annually to the General Assembly."

Sec. 2. The Department of Administration shall include in its report to the General Assembly in 1991 any data on participation by businesses described in Section 1 of this act that has been reported to it from governmental entities during previous years but that the Department has never reported to a standing committee of the General Assembly.

Sec. 3. The Department shall use any moneys available to it that are necessary to implement Sections 1 and 2.

Sec. 4. G.S. 143-132 reads as rewritten:

"§ 143-132. Minimum number of bids for public contracts.

(a) No contract to which G.S. 143-129 applies for construction or repairs shall be awarded by any board or governing body of the State, or any subdivision thereof, unless at least three competitive bids have been received from reputable and qualified contractors regularly engaged in their respective lines of endeavor; however, this section shall not apply to contracts which are negotiated as provided for in G.S. 143-129. Provided that if after advertisement for bids as required by G.S. 143-129, not as many as three competitive bids have been received from reputable and qualified contractors regularly engaged in their respective lines of endeavor, said board or governing body of the State agency or of a county, city, town or other subdivision of the State shall again advertise for bids; and if as a result of such second advertisement, not as many as three competitive bids from reputable and qualified contractors are received, such board or governing body may then let the contract to the lowest responsible bidder submitting a bid for such project, even though only one bid is received.

(b) For purposes of contracts bid in the alternative between the separate prime and single-prime contracts, pursuant to G.S. 143-128(b), a bid submitted by a single-prime contractor shall constitute a competitive bid in each of the four subdivisions or branches of work listed in ~~G.S. 143-128(a)~~ G.S. 143-128(a), and each full set of separate prime bids shall constitute a competitive single-prime bid in meeting the requirements of subsection (a) of this section.

(c) The State Building Commission shall develop guidelines no later than January 1, 1991 governing the opening of bids pursuant to this Article. These guidelines shall be distributed to all public bodies subject to this Article. The guidelines shall not be subject to the provisions of Chapter 150B of the General Statutes."

Appendix C

Sec. 5. This act shall become effective July 1, 1990.
In the General Assembly read three times and ratified this the 27th day of
July, 1990.

JAMES C. GARDNER

James C. Gardner
President of the Senate

J. L. MAVRETIC

J. L. Mavretic
Speaker of the House of Representatives



LACY H. THORNBURG
ATTORNEY GENERAL

State of North Carolina

Department of Justice

P. O. Box 25201

RALEIGH

27611

(919) 733-3316

(919) 733-4185

25 January 1990

Subject: Public Contracts; Competitive Bidding; Minority Business Participation Provisions; United States Constitution

Requested by: Representative Thomas C. Hardaway, Co-Chairman
Senator Ralph Hunt, Co-Chairman
Legislative Research Commission Committee
on Minority Business Contracts and Small
Business Assistance

Question: In view of the principles recited by the United States Supreme Court in City of Richmond v. J. A. Croson Company, are the minority participation provisions in G.S. 143-128, G.S. 136-28.4, G.S. 160A-17.1, Chapter 8, Section 3(b) of the 1989 Session Laws (Senate Bill 38), and Executive Order 77 constitutional?

Conclusion: The referenced provisions appear to be facially constitutional under the principles established in Croson.

In City of Richmond v. J. A. Croson, Co., 109 S.Ct. 706 (1989), the United States Supreme Court addressed the issue of whether Richmond, Virginia's Minority Business Utilization Plan (the "Plan"), violated the Equal Protection Clause of the Fourteenth Amendment. In 1983, the Richmond City Council adopted the Plan which required non-minority prime contractors awarded construction contracts by the city to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises ("MBE"). Under the Plan an MBE was defined as a business at least 51% owned and controlled by minority group members. "Minority Group Members" were defined as "Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts". The Plan's rules provided that waivers would only be granted under "exceptional circumstances".

The challenge by J. A. Croson Company, a mechanical, plumbing and heating contractor, resulted from Croson's attempts

to obtain a contract for the installation of plumbing fixtures at the city jail. Due to problems encountered in hiring a minority subcontractor, as required under the Plan, Croson requested a waiver of the MBE requirements. In the alternative, Croson requested a price increase to cover the additional cost of hiring the only available MBE subcontractor. The City denied both requests and Croson subsequently responded by bringing an action under Title 42, Section 1983, of the United States Code, challenging the constitutionality of the Plan.

In *Croson*, the United States Supreme Court held that the Plan violated the right of all persons to the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. Under the Court's analysis, the program enacted by the City constituted a clear racial preference whereby non-minority contractors were excluded from the right to compete for at least 30% of the public funds spent by the City for construction. As such, the Plan was only permissible if capable of withstanding a traditional "strict scrutiny" standard of review.

Under the first prong of strict scrutiny analysis the City was required to demonstrate a compelling governmental interest in creating the racial preference. While recognizing the broad remedial powers of Congress to use certain racial and ethnic criteria with the objective of curing the effects of past discriminatory practices, the Court held that the City was required to have a strong factual basis for its conclusion that remedial action was necessary. Upon reviewing the evidence, the Court concluded that none of the factors relied on by the City proved that identifiable discrimination existed in the Richmond construction industry. The City therefore failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.

The Court also considered the second prong of the strict scrutiny test and determined that it was essentially impossible to determine whether the Plan was "narrowly tailored" to address a specific problem inasmuch as there was no evidence that the 30% quota was linked to race in any way. Observations were made that the City Council appeared to have made no attempts to use benign, race-neutral methods of increasing participation by minority businesses in public contracting and that the 30% quota had no rational relationship to any identifiable goal. Therefore, due to the City's failure to identify prior discrimination requiring remedial action, the disparate treatment of citizens on a racial basis was held to violate the Equal Protection Clause.

As a result of the Croson decision, numerous State and local minority participation programs have been challenged. In most instances, the basis for the challenge is that the state or local body has failed to develop a sufficient factual history of past

discrimination prior to enacting set-aside programs based on racial preferences. The issue posed here is the question of the constitutionality of four North Carolina statutes and one Executive Order establishing minority participation programs, in light of the Croson opinion.

The first provision inquired about is G.S. 143-128, as amended by Chapter 480 of the 1989 Session Laws (Senate Bill 308). This amendment added an alternative procedure for the award of public construction contracts whereby public bodies may now elect to award a single prime contract as opposed to the separate prime contracts previously required. Under the amendment the State is also required to have a "...verifiable ten percent (10%) goal for participation by minority businesses..." in State construction projects. Cities, counties, and other public bodies are required to adopt "...appropriate verifiable percentage goal(s) for participation by minority businesses..." in their construction projects. The term "minority business" is defined as a business which is at least 51% owned by one or more minority persons and which is managed by one or more minority persons who own the business. The term "minority person" is defined to include citizens and lawful permanent residents of the United States who are Black, Hispanic, Asian-American, American-Indian, Alaskan Native or female.

A key factor which distinguishes this provision from the Richmond Plan is that the verifiable 10% goal for participation by minority businesses does not mandate that a specific portion of the project funds be actually awarded as a racial preference. G.S. 143-128(c)(3) states:

"The term 'verifiable goal' means for purposes of the separate contract system, that the awarding authority has adopted written guidelines specifying the actions that will be taken to ensure a good faith effort in the recruitment and selection of minority businesses for participation in contracts awarded under this section..."

In regard to contracts awarded under the new single-prime alternative, G.S. 143-128(c)(4) states:

"The term 'verifiable goal' means for purposes of the single-prime contract system, that the awarding authority has adopted written guidelines specifying the actions that the prime contractor must take to insure a good faith effort in the recruitment and selection of minority businesses for participation in contracts awarded under this section; the required actions must be documented in writing by the contractor to the appropriate awarding authority."

The program mandated under this provision therefore only requires the creation of written guidelines designed to insure that efforts will be made to increase the amount of participation in public construction contract work by minority businesses. Absent a mandatory racial preference, North Carolina's program is not required to satisfy the strict standards imposed on the City of Richmond.

The program contemplated by the Legislature in amending G.S. 143-128 is essentially a benign attempt to break down artificial barriers which may have precluded participation in public contracting by many otherwise qualified businesses owned by members of various minority groups and women. Unlike the rigid 30% set-aside requirement under the Richmond Plan, however, the requirements of G.S. 143-128 do not mandate that any public contract or subcontract be awarded strictly on the basis of race. Crucial to this analysis is the following statement in G.S. 143-128(d):

"The State and its political subdivisions shall award public contracts pursuant to this section without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition as defined in G.S. 168A-3. Nothing in this section shall be construed to require contractors or awarding authorities to award contracts or subcontracts or to make purchases of materials or equipment from minority-business contractors or minority-business subcontractors who do not submit the lowest responsible bid or bids."

The statute therefore mandates that the actual contract award be made on a race-neutral basis to the lowest responsible bidder.

The Supreme Court in Croson sanctioned the use of race-neutral means of increasing minority participation in public contracting, stating:

"Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those whose have suffered the effects of past societal discrimination or neglect."
Croson, supra at 716.

There is no suggestion by the Court that all programs designed to increase minority participation in public contracting, even if

they disproportionately benefit certain minority groups, necessarily violate the dictates of the Equal Protection Clause. It is only where certain citizens are denied the opportunity to compete for a fixed percentage of public contracts based solely on their race that the constitutional right of each person to be treated with equal dignity and respect demands that a program be strictly scrutinized, as was the case with the Richmond Plan.

Our analysis of G.S. 143-128 does not lend to a conclusion that any person would be denied the opportunity to compete for a public contract solely on the basis of race. As noted, the previously referenced language of G.S. 143-128(d) specifically precludes an award on a preferential basis. It is therefore our opinion that G.S. 143-128 does not, on its face, create an impermissible racial classification in violation of the Equal Protection Clause.

The second provision in question is G.S. 136-28.4, as amended by Chapter 692 of the 1989 Session Laws (House Bill 399). This provision of the Highway Trust Fund Bill establishes a 10% "goal" for participation by minority businesses in highway and bridge construction and maintenance. G.S. 136-28.4(b) states:

"A ten percent (10%) goal for participation by minority businesses in road and bridge construction, alteration, or maintenance projects is established. The Department of Transportation shall endeavor to award to minority businesses at least ten percent (10%), by value, of the contracts that it lets for the construction, alteration or maintenance of roads and bridges. The Department shall adopt written procedures specifying the steps it will take to achieve this goal, provided that the Department shall give equal opportunity for contracts it lets without regard to race, religion, color, creed, national origin, sex, age or handicapping condition, as defined in G.S. 168A-3, to all contractors and businesses otherwise qualified."

Here again the legislative intent appears to have been the encouragement of minority participation in contracts awarded by the Department of Transportation, without the necessity of creating racially based quotas or set-asides. The statute is clear, however, that the actual contract awards must be made on a race-neutral basis.

Under a Croson analysis, this provision does not establish a fixed percentage of public contracts or public contract funds for which certain groups of persons may not compete. Without such a deprivation of personal rights it is our opinion that the provisions of G.S. 136-28.4 do not violate the Equal Protection Clause.

G.S. 160A-17.1 allows cities and counties to agree to and comply with minority business enterprise participation requirements established by the federal government as a precondition to receipt of federal funds. The purpose of this provision was to allow local governments to comply with federally mandated minority set-aside requirements without being in direct violation of state bid laws requiring award to the lowest responsible bidder without regard to race. In many cases, a precondition to federal funding is a requirement that 10% of the grant amount be awarded to minority business enterprises.

In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Supreme Court upheld the minority set-aside program required under the Public Works Employment Act of 1977. The Act required state and local governments to expend at least 10% of the amount of each grant on minority business enterprises. In addressing the validity of this requirement, the Court stressed the broad remedial powers of Congress under Section 5 of the Fourteenth Amendment to enforce constitutional equal protection guarantees. Based upon this power, the Court held that Congress could mandate state and local government compliance with a federal set-aside program.

In Croson the City attempted to rely on Fullilove for its position that the City of Richmond enjoyed broad legislative power to cure the effects of discrimination in the construction industry. This reliance was rejected by the Court, emphasizing the distinction between the broad powers of Congress in carrying out its responsibility for enforcement of the Fourteenth Amendment as opposed to the narrow authority of state and local governments. In addressing this distinction, the Court affirmed the power of Congress, as discussed in Fullilove, to impose minority set-aside requirements on state and local governments which themselves may not be able to establish the requisite compelling need to establish such programs in non-federally funded projects. It is therefore our opinion that both Fullilove and Croson support the validity of G.S. 160A-17.1.

The fourth provision in question was included in Chapter 8, Section 3(b) of the 1989 Session Laws (Senate Bill 38). This Act, making emergency appropriations for improvement to the prison system, includes the following provision in Subsection 3(b):

"Of the funds appropriated in Subsection (a) of this section for the purpose of construction of prison facilities, the Office of State Budget and Management shall have a verifiable ten percent (10%) goal for participation by minority business...".

The provision provides no direct guidance as to the nature of the minority participation program contemplated other than the use of

the phrase "verifiable ten percent (10%) goal", which is the same language adopted in the previously referenced 1989 amendments to G.S. 143-128.

We are aware, however, that both Chapter 8 (Senate Bill 38) and Chapter 480 (Senate Bill 308) were enacted by the 1989 Session of the 1989 General Assembly. As an established principle of statutory construction, all acts of the same session of the legislature upon the same subject matter are considered as one act and must be construed together under the doctrine of "in pari materia". See Wilson v. Jordan, 124 N.C. 683 (1899). It is therefore appropriate to consider the phrase "verifiable ten percent (10%) goal" used in Chapter 8, dealing with prison construction, in the context of the identical phrase used in Chapter 480 in regard to other building projects. As such, the phrase "verifiable ten percent (10%) goal" included in Chapter 8 may be interpreted to require written guidelines to insure a good faith effort to recruit minority business participation as specifically defined by G.S. 143-128(c)(3)(4). It may also be assumed that, based upon the prohibition against contract awards on the basis of race in general public building projects, the legislature intended that contracts for prison construction awarded under Chapter 8 be made on a race-neutral basis. We therefore find no constitutional impediment to the minority participation goal included under Chapter 8 of the 1989 Session Laws.

The final inquiry is in regard to Executive Order No. 77, issued September 14, 1988, establishing the "Governor's Program to Encourage Business Enterprises Owned by Minority, Women and Handicapped Persons". This Order established a program for the purpose of increasing the participation of businesses owned and controlled by minorities, women and handicapped persons in State purchasing, State construction projects, and the acquisition of real property by the State. Specifically in regard to purchasing, the Order established a "program objective" for fiscal year 1988-1989 to purchase a minimum of four percent of the State's purchases of goods and services from businesses owned and controlled by minorities, women and handicapped persons. No percentage goals were established in regard to State construction contracts, although the Division of State Construction was directed to accumulate data to support the future establishment of percentage goals. In regard to the acquisition of real estate, the State Property Office was given a general directive to establish acquisition policies which would further the purposes of the Order.

Under the Order neither the Division of State Construction nor the State Property Office is required to attempt to meet a percentage goal for minority participation. It is only the Purchase and Contract Division of the Department of

Administration that is directed to attempt to meet the goal of four percent minority participation.

In regard to this objective, the Order includes among the program purposes an intent to increase the amount of goods and services acquired from businesses owned by minorities, women and handicapped persons; the reduction of barriers that reduce the participation of minorities, women and handicapped persons; the identification of prospective minorities, women and handicapped vendors and service providers, and; the general promotion of awareness among minorities, women and handicapped persons of opportunities to do business with state government. We find these to be the type of race-neutral devices sanctioned in Croson for the purpose of attempting to increase the accessibility of public contracting opportunities by minorities and other entrepreneurs of all races. We find no directive in the Order to actually reserve a specific percentage of contracting opportunities for minorities to the exclusion of other persons. We therefore are of the opinion that Executive Order No. 77 is a valid exercise of the executive powers of the Governor.

In conclusion, none of the provisions in question mandate a racial preference which would result in a deprivation of personal rights guaranteed to all persons by the Equal Protection Clause of the Fourteenth Amendment. Absent such a preference, the "strict scrutiny" test applied to the Richmond Plan by the Supreme Court in Croson is not required to be passed by state and local entities in North Carolina attempting to achieve the goals referenced in the provisions discussed above. You have not requested, and we express no opinion, on the constitutionality of these provisions as applied under any individual program. It is our opinion, however, that the provisions referenced facially meet the constitutional standards established in Croson.

LACY H. THORNBURG
Attorney General

Grayson G. Kelley
Assistant Attorney General

GGK/chw

APPENDIX E

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

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91-RR-004

THIS IS A DRAFT 4-DEC-90 11:40:38

Short Title: Comprehensive Goals.

(Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO ESTABLISH A COMPREHENSIVE GOALS PROGRAM FOR INCLUSION
3 OF BUSINESSES OWNED BY MINORITIES, WOMEN, AND THE DISABLED IN
4 PUBLIC CONTRACTS.
5 The General Assembly of North Carolina enacts:
6 Section 1. Chapter 143 of the General Statutes is
7 amended by adding a new Article to read:
8 "ARTICLE 3E.
9 "Full Inclusion in Public Contracts
10 "§ 143-64.40. Purpose.
11 The purpose of this Article is to provide maximum contracting
12 opportunities to minority business enterprises (MBEs), womens
13 business enterprises (WBEs), and disabled business enterprises
14 (DBEs). To further this purpose:
15 (1) Each procurement agency in State government, other
16 than the Department of Transportation with regard
17 to highway construction, shall structure its
18 procedures for procuring supplies, services,
19 maintenance, and construction to attempt to achieve
20 the following minimum verifiable percentage goals:
21 a. ten percent (10%) of the total dollar value of
22 these procurements that are made directly or
23 indirectly from certified MBEs;

1 b. five percent (5%) of the total dollar value of
 2 these procurements that are made directly or
 3 indirectly from certified WBES;

4 c. two percent (2%) of the total dollar value of
 5 these procurements that are made directly or
 6 indirectly from certified DBES;

7 For purposes of these goals, a contract shall be
 8 counted as being with an MBE without regard to the
 9 gender of the owner, but only if the business does
 10 not qualify as a DBE; shall be counted as being
 11 with a WBE only if the business does not also
 12 qualify as a DBE or MBE; and shall be counted as a
 13 DBE without regard to the race or gender of the
 14 owner.

15 (2) Each procurement agency of local government shall
 16 adopt, after notice and public hearing, a minimum
 17 appropriate verifiable percentage goal for
 18 inclusion of certified MBES, WBES, and DBES in
 19 contracts for supplies, services, maintenance, or
 20 construction, unless those contracts fall below the
 21 dollar thresholds set by G.S. 143-129 for the
 22 competitive bidding requirement;

23 (3) Nothing in this Article shall be construed to
 24 require procurement agencies or contractors to
 25 award contracts or subcontracts to or to make
 26 purchases of materials or equipment from an MBE,
 27 WBE, or DBE who does not submit the lowest
 28 responsible bid, taking into consideration quality,
 29 performance, and the time specified in the
 30 proposals for the performance of the contract.

31 "§ 143-64.41. Definitions.

32 As used in this Article, unless the context indicates
 33 otherwise:

34 (1) 'Appropriate verifiable percentage goal' means a
 35 verifiable percentage goal that the governing body
 36 of the procurement agency determines, after a
 37 public hearing, will foster maximum contracting
 38 opportunities for certified MBES, WBES, and DBES,
 39 in light of local circumstances; provided that no
 40 goals are appropriate that are lower than the
 41 following percentages of the total value of the
 42 procurements:

43 a. five percent (5%) from certified MBES,

- 1 b. two and one half percent (2.5%) from certified
2 WBEs,
3 c. one percent (1%) from certified DBEs.
4 For purposes of these goals, a contract shall be
5 counted as being with an MBE without regard to the
6 gender of the owner, but only if the business does
7 not qualify as a DBE; shall be counted as being
8 with a WBE only if the business does not also
9 qualify as a DBE or MBE; and shall be counted as a
10 DBE without regard to the race or gender of the
11 owner.
- 12 (2) 'Certification' means a determination made in
13 accordance with the provisions of G.S. § 143-64.47.
14 that a legal entity is an MBE, a WBE, or a DBE, for
15 purposes of this Article.
- 16 (3) 'Control' means the exercise of the power to manage
17 and operate a business enterprise.
- 18 (4) 'Disabled person' means a handicapped person as
19 defined in G.S. 168A-3.
- 20 (5) 'Disabled Business Enterprise' (DBE), means any
21 legal entity, other than a joint venture, organized
22 to engage in commercial transactions, that is at
23 least fifty-one percent (51%) owned and controlled
24 by one or more disabled persons. or a non-profit
25 entity organized to promote the interests of
26 disabled persons, or a sheltered workshop whose
27 main function is to provide services to disabled
28 persons.
- 29 (6) 'Goal' means a voluntary percentage or quantitative
30 objective.
- 31 (7) 'Minority Business Enterprise' (MBE), means any
32 legal entity, other than a joint venture, organized
33 to engage in commercial transactions, that is at
34 least fifty-one percent (51%) owned and controlled
35 by one or more minority persons.
- 36 (8) 'Minority person' means a member of one of the
37 following groups: African-Americans, Hispanics,
38 American Indians, Asians.
- 39 (9) 'Ownership' means:
40 a. For a sole proprietorship, that the sole
41 proprietor is a disabled person, a minority
42 person, or a woman. If the ownership interest
43 held by a disabled person, a minority person,
44 or a woman is subject to formal or informal

- 1 restrictions such as options, security
2 interests, or agreements held by a nonminority
3 person or business entity, the options,
4 security interests, or agreements held by the
5 nonminority person or business entity may not
6 significantly impair the minority person's
7 ownership interest.
- 8 b. For a partnership, that at least fifty-one
9 percent (51%) of the partnership's assets or
10 interests are owned by a minority person or
11 minority persons. If the ownership interest
12 held by a minority person is subject to formal
13 or informal restrictions such as options,
14 security interests, or agreements, held by a
15 nonminority person or business entity, the
16 options, security interests, or agreements
17 held by the nonminority person or business
18 entity may not significantly impair the
19 minority person's ownership interest.
- 20 c. For a corporation, that legal and equitable
21 ownership of at least fifty-one percent (51%)
22 of all classes of stock, bonds, or other
23 securities issued by the corporation is owned
24 by a minority person or minority persons. If
25 an ownership interest held by a minority
26 person is subject to formal or informal
27 restrictions such as options, security
28 interests, or agreements held by a nonminority
29 person or business entity, the options,
30 security interests, or agreements held by the
31 nonminority person or business entity may not
32 significantly impair the minority person's
33 ownership interest.
- 34 (10) 'Procurement agency' means any State agency or
35 local government that is authorized by law or
36 regulations to procure or contract. The term
37 includes, but is not limited to, cities, counties,
38 and boards of education.
- 39 (11) 'Verifiable percentage goal' means that the
40 procurement agency has adopted written guidelines
41 specifying the actions that will be taken;
42 a. by the procurement agency itself in the case
43 of the separate prime contract system; and

- 1 b. by the prime contractor in the case of the
2 single-prime contract system
3 to ensure a good faith effort in the recruitment
4 and selection of certified MBES, WBES, and DBES for
5 inclusion in contracts awarded for procurement of
6 supplies, services, maintenance, and construction.
7 Guidelines adopted shall conform to rules issued by
8 the Department of Administration under G.S.
9 143-64.46.
- 10 (12) 'Womens Business Enterprise' (WBE), means any legal
11 entity, other than a joint venture, organized to
12 engage in commercial transactions, that is at least
13 fifty-one percent (51%) owned and controlled by one
14 or more women.
- 15 "§ 143-64.42. Scope of Article.
16 This Article applies to every procurement of supplies,
17 services, maintenance, and construction by a procurement agency.
- 18 "§ 143-64.43. Procurement agency responsibility.
19 (a) Each procurement agency shall make its procurements in
20 accordance with this Article. Each local board of education
21 shall adopt procedures consistent with this Article before
22 obtaining State funds for public school construction projects.
23 When delegating procurement authority to procurement agencies and
24 other departments, the Department of Administration shall
25 condition the delegation on compliance with this Article.
- 26 (b) Procurement agencies shall, to the extent practicable,
27 develop uniform affidavits and reporting forms required by this
28 Article.
- 29 "§ 143-64.44. MBE-WBE-DBE Liaison Officer.
30 The head of each procurement agency shall designate an employee
31 to be an MBE-WBE-DBE Liaison Officer in the administration of
32 that agency's minority business enterprise program. The MBE-WBE-
33 DBE Liaison Officer shall be a high-level employee reporting
34 directly to a Secretary, Deputy Secretary, or head of a
35 Department or procurement agency. The MBE-WBE-DBE Liaison
36 Officer shall be responsible for coordinating agency outreach
37 efforts to the minority business community, reviewing agency
38 contracting procedures to assure compliance with this Article,
39 assisting in the resolution of contracting issues, and for the
40 submission of all required MBE-WBE-DBE program reports or
41 information.
- 42 "§ 143-64.45. Central directory.
43 The Department of Administration shall publish a central
44 directory of MBES, WBES, and DBES certified in accordance with

1 G.S. 143-64.47. The central directory shall specify the type of
2 supplies, services, maintenance, or construction primarily
3 provided by the MBE, WBE, or DBE, and the date of certification.

4 The central directory shall include:

- 5 (1) The address;
6 (2) Phone number; and
7 (3) Contact person

8 of all certified MBES, WBEs, and DBEs; and the name of every
9 business entity that has been denied certification or decertified
10 within the last two years. The directory shall be updated at
11 least quarterly, and if feasible, monthly.

12 "§ 143-64.46. Outreach and notification.

13 The Department of Administration shall establish procedures for
14 outreach, notification, and solicitation of MBES, WBEs, and DBEs.

15 "§ 143-64.47. Certification.

16 (a) The Department of Administration shall develop a procedure
17 for the certification, recertification, and decertification of
18 businesses as MBES, WBEs, or DBEs. Any procurement agency may
19 certify, decertify, or recertify a business as MBE, WBE, DBE, or
20 more than one of the three, if the procurement agency follows the
21 procedures established by the Department of Administration.

22 (b) If a business petitions the Department of Administration
23 for action under the certification process developed under
24 subsection (a), the Department of Administration shall take the
25 appropriate action according to the certification process not
26 more than 60 days after the receipt of the application, If a
27 business petitions a procurement agency other than the Department
28 of Administration for action under the certification process,
29 that procurement agency may take the appropriate action itself,
30 or it may forward the petition to the Department of
31 Administration for action. If the procurement agency elects to
32 take the appropriate action itself, it shall do so not more than
33 60 days after receipt of the application; if the procurement
34 agency elects to forward the application to the Department of
35 Administration, it shall do so not more than 30 days after
36 receipt of the application. If the Department of Administration
37 receives a petition forwarded from a procurement agency, the
38 Department shall take the appropriate action according to the
39 certification process not more than 60 days after the
40 Department's receipt of the application.

41 (c) A business certified as an MBE, a WBE, or a DBE in
42 accordance with this section shall be recognised as such by all
43 other procurement agencies for the purposes of this Article.

1 (d) The Department of Administration or another procurement
2 agency may request the following information to assist in any
3 certification, recertification, and decertification
4 determination:

- 5 (1) Copies of articles of incorporation, bylaws,
6 minutes, shareholder agreements, stock
7 certificates, stock transfer ledgers, any
8 additional profit-sharing agreements or buyout
9 rights, or in the case of a partnership, the
10 partnership agreement;
11 (2) Current financial statements, business licenses,
12 the prior two years' federal tax returns, cancelled
13 checks, resumes of principal parties, and any
14 relevant personal and third-party agreements, such
15 as rental and management agreements;
16 (3) Any other information that the certifying entity
17 determines is necessary.

18 Failure to furnish the requested information within 30 days may
19 result in a denial of certification or recertification, or a
20 determination to decertify.

21 **"§ 143-426.48. Adoption of rules.**

22 The Department of Administration shall submit for review by the
23 Administrative Rules Review Commission any rules deemed
24 appropriate for the enforcement of this Article.

25 **"§ 143-426.49. False information supplied by business.**

26 (a) When a procurement agency determines that a business has
27 knowingly supplied false information in order to be classified as
28 an MBE, WBE, or DBE, the procurement agency shall contact the
29 Department of Administration to determine, after consultation
30 with legal counsel, the appropriate action to be taken.

31 (b) Prior to any final determination under subsection (a) of
32 this section, the business charged with supplying false
33 information may commence an action under Chapter 150B of the
34 General Statutes.

35 (c) Any person who, with intent to defraud another, represents
36 himself as an MBE, WBE, or DBE for the purpose of obtaining
37 money, goods, property, services, choses in action, or any item
38 of value from a person within this State is guilty of a Class H
39 felony."

40 **"§ 143-64.50. Reporting requirements.**

41 (a) Each procurement agency, other than the Department of
42 Transportation with regard to highway construction, and each
43 private nonprofit corporation, other than an institution of
44 higher education or a hospital, that receives an appropriation of

1 five hundred thousand dollars (\$500,000) or more during a fiscal
2 year from the General Assembly. shall make a report annually
3 within 90 days following the close of the fiscal year to the
4 Department of Administration:

5 (1) The total number and value of its procurements from
6 certified MBEs, WBEs, and DBEs as prime
7 contractors, and separately as subcontractors.

8 (2) The percentage which purchases and contracts from
9 MBEs, WBEs, and DBEs represent of its total number
10 and value of its procurements from business
11 enterprises for the fiscal year just ended. The
12 procurement agency or corporation shall report
13 percentages for each of the following groups:

14 a. non-disabled MBEs, regardless of the gender of
15 the owner,

16 b. non-minority, non-disabled WBEs,

17 c. all DBEs, regardless of the minority status or
18 gender,

19 d. male disabled MBEs,

20 e. female disabled MBEs,

21 f. male non-disabled MBEs,

22 g. female non-disabled MBEs,

23 h. minority disabled WBEs,

24 i. non-minority disabled WBEs,

25 j. minority non-disabled WBEs,

26 k. male minority DBEs,

27 l. female minority DBEs,

28 m. female non-minority DBEs;

29 (3) An evaluation by the procurement agency or
30 corporation of the success of its MBE-WBE-DBE
31 program;

32 provided that procurement agencies of local government shall not
33 be required to report on contracts that fall below the dollar
34 thresholds set by G.S. 143-129 for the competitive bidding
35 requirement;

36 The Department of Administration shall prepare an annual report
37 summarizing MBE, WBE, and DBE participation throughout the State
38 for submission by the end of each calendar year to the General
39 Assembly and to each Department and procurement agency."

40 (b) The Department of Transportation shall prepare an annual
41 report for submission to the General Assembly by the end of each
42 calendar year. The report shall contain the information on
43 highway construction contracts that is equivalent to the
44 information outlined in subsection (a) of this section."

1 Sec. 2. G.S. 143-48 reads as rewritten:
2 "§ 143-48. State policy; cooperation in promoting the use of
3 small, minority, physically handicapped and women contractors;
4 ~~purpose; required annual reports.~~

5 ~~(a) It is the policy of this State to encourage and promote~~
6 ~~the use of small, minority, physically handicapped and women~~
7 ~~contractors in State purchasing of goods and services. All State~~
8 ~~agencies, institutions and political subdivisions shall cooperate~~
9 ~~with the Department of Administration and all other State~~
10 ~~agencies, institutions and political subdivisions in efforts to~~
11 ~~encourage the use of small, minority, physically handicapped and~~
12 ~~women contractors in achieving the purpose of this Article, which~~
13 ~~is to provide for the effective and economical acquisition,~~
14 ~~management and disposition of goods and services by and through~~
15 ~~the Department of Administration. Accordingly, all contracts~~
16 ~~entered into for the purchase of goods and services pursuant to~~
17 ~~this Article shall be subject to the provision of Article 3E of~~
18 ~~this Chapter."~~

19 ~~(b) Every governmental entity required by statute to use the~~
20 ~~services of the Department of Administration in the purchase of~~
21 ~~goods and services and every private, nonprofit corporation other~~
22 ~~than an institution of higher education or a hospital that~~
23 ~~receives an appropriation of five hundred thousand dollars~~
24 ~~(\$500,000) or more during a fiscal year from the General Assembly~~
25 ~~shall report to the Department of Administration annually on what~~
26 ~~percentage of its contract purchases of goods and services,~~
27 ~~through term contracts and open-market contracts, were from~~
28 ~~minority-owned businesses, what percentage from female-owned~~
29 ~~businesses, and what percentage from disabled-owned businesses.~~
30 ~~The same governmental entities shall include in their reports~~
31 ~~what percentages of the contract bids for such purchases were~~
32 ~~from such businesses. The Department of Administration shall~~
33 ~~provide instructions to the reporting entities concerning the~~
34 ~~manner of reporting and the definitions of the businesses~~
35 ~~referred to in this act, provided that, for the purposes of this~~
36 ~~act:—~~

37 ~~(1) A business in one of the categories above means~~
38 ~~one:~~
39 ~~a. In which at least fifty-one percent (51%) of~~
40 ~~the business, or of the stock in the case of a~~
41 ~~corporation, is owned by one or more persons~~
42 ~~in the category; and—~~

- 1 ~~b. Of which the management and daily business~~
2 ~~operations are controlled by one or more~~
3 ~~persons in the category who own it; and~~
4 ~~(2) A female or a disabled person is not a minority,~~
5 ~~unless the female or disabled person is also a~~
6 ~~member of one of the minority groups described in~~
7 ~~G.S. 143-128(c)(2)a through d; and~~
8 ~~(3) A disabled person means a 'handicapped person' as~~
9 ~~defined in G.S. 168A-3(4).~~

10 ~~The Department of Administration shall collect and compile the~~
11 ~~data described in this section and report it annually to the~~
12 ~~General Assembly."~~

13 Sec. 3. G.S. 143-135.5 reads as rewritten:
14 "§ 143-135.5. State policy; cooperation in promoting the use of
15 small, minority, physically handicapped and women contractors;
16 purpose.

17 It is the policy of this State to encourage and promote the use
18 of small, minority, physically handicapped and women contractors
19 in State construction projects. All State agencies, institutions
20 and political subdivisions shall cooperate with the Department of
21 Administration and all other State agencies, institutions and
22 political subdivisions in efforts to encourage and promote the
23 use of small, minority, physically handicapped and women
24 contractors in achieving the purpose of this Article, which is
25 the effective and economical construction of public buildings.
26 Accordingly, all construction contracts entered into pursuant to
27 this Article shall be subject to the provisions of Article 3E of
28 this Chapter."

29 Sec. 4. G.S. 143-128(c) and (d) are repealed.

30 Sec. 5. G.S. 143-128 is amended by adding a new
31 subsection to read:

32 "(e) Any state agency or institution or city, county or other
33 public body shall be governed by the goals and procedures of
34 Article 3E of this Chapter for all contracts awarded pursuant to
35 this section."

36 Sec. 6. This act shall become effective January 1,
37 1992.

APPENDIX E

SUMMARY OF LEGISLATIVE PROPOSAL (DRAFT BILL)

- SCOPE:
- * All State agencies and local governments (cities, counties, and school boards).
 - * All contracts by State agencies for goods and services and non-highway construction. (Highway construction left as is.)
 - * All contracts by local governments of:
 - \$50,000 or more for construction, or
 - \$20,000 or more for goods and services.(The thresholds now set for competitive bidding.)
- GOALS FOR STATEWIDE AGENCIES:
- * 10% participation by Minority Business Enterprises (with minority women but not minority disabled counted toward this goal),
 - * 5% by Womens Business Enterprises (with only non-minority, non-disabled women counted toward this goal),
 - * 2% by Disabled Business Enterprises (with all disabled counted toward this goal).
 - * Notwithstanding goals, bill does nothing to prevent contract from going to the lowest bidder.
- GOALS FOR LOCAL GOVTS:
- * Each local government sets "appropriate" goals for MBEs, WBEs, and DBEs, based on what it believes will foster maximum contracting opportunities for those groups within the local context. But the bill sets a floor on what a local government may deem "appropriate":
 - 5% participation by MBEs,
 - 2.5% by WBEs,
 - 1% by DBEs.
 - * Notwithstanding goals, bill does nothing to prevent contract from going to the lowest bidder.
- REPORTING:
- * Central reporting to Department of Administration by all State agencies, local governments, and nonprofit corporations (but not college or

APPENDIX E

hospital) that receives or more \$500,000 from General Assembly.

- * Reporting required by category: male MBE, female MBE, white WBE, minority WBE, with disabled identified in all those categories.

OTHER

FEATURES:

- * Directs Department of Administration to establish procedures for outreach, notification, and solicitation of MBEs, WBEs, and DBEs.
- * Requires designation of MBE liaison officer in each State agency and local government to coordinate program.
- * Directs Dept. of Administration to certify businesses as genuinely MBE, WBE, or DBE (with reciprocal arrangements for local governments that wish to do their own certification). Dept. of Administration must establish a central directory of certified businesses.
- * Makes fraud against certification process a Class H felony.

EFFECTIVE: January 1, 1992.